RECENT CASE NOTES

ADMIRALTY—MARITIME LIENS—PRIORITY BETWEEN MARITIME LIEN AND FEDERAL TAX LIEN.—Certain shipowners became delinquent in federal income tax payments. Subsequently the petitioners furnished the ships with materials and supplies. Thereafter, the United States levied liens on the vessels for the taxes. Later the petitioners filed libels for maritime liens. The United States moved to dismiss the petitions. *Held*, that the maritime liens took priority over the tax liens and that the motion to dismiss be denied. *The River Queen, The Dispatch II, The Eva Leigh* (1925, E. D. Va.) 8 Fed. (2d) 426.

Debts owing to the United States have priority over unsecured claims of other creditors in the distribution of an insolvent estate. 6 U. S. Comp. Sts. 1916, sec. 6372. This priority is said to depend exclusively on statute. See *United States v. Oklahoma* (1923) 261 U. S. 253, 259, 43 Sup. Ct. 295, 297. United States tax claims, on the ground that they stand on a higher plane (either that of *parens patriae* or "an exaction imposed by the sovereign for his own purposes of an importance paramount to the rights of an individual") have been awarded like priority, although not within any statute. *Liberty Mut. Ins. Co. v. Johnson Shipyards Corp.* (1925, C. C. A. 2d) 6 Fed. (2d) 752 (equity receivership suit); see Blair, *The Priority of the United States in Equity Receiverships* (1925) 39 HARV. L. REV. 1, 17. A United States tax lien has been awarded priority under Comp. Sts. sec. 6372, *supra*, over a prior ship mortgage registered under the Ship Mortgage Act of 1920 (2 U. S. Comp. Sts. Ann. Supp. 1923, secs. 8146 ¼jjj-t). *The Melissa Trask* (1923, D. Mass.) 285 Fed. 781. This decision has been adversely criticised as unwarrantedly construing a priority in the distribution of insolvent estates into a priority of tax liens over other secured claims. Fridlund, *Federal Taxes and Preferred Ship Mortgages* (1925) 38 HARV. L. REV. 1060. Maritime liens are uniformly given preference over secured claims of other kinds prior and subsequent. *Phillips v. The Scattergood* (1828, E. D. Pa.) 19 Fed. Cas. No. 11106 (execution lien); *The Favorite* (1875, D. Or.) 8 Fed. Cas. No. 4699 (subsequent mortgage); *The Native* (1876, S. D. N. Y.) 17 Fed. Cas. No. 10054 (express pledge); *The J. E. Rumbell* (1893) 148 U. S. 1, 13 Sup. Ct. 498 (prior mortgage). Accordingly they have taken priority over United States execution liens. *Conard v. Atlantic Ins. Co.* (1828, U. S.) 1 Pet. 386. And over United States forfeitures which relate back to the time of the wrongful act. *The St. Jago de Cuba* (1824, U. S.) 9 Wheat. 409 (wrongful act subsequent to facts creating lien); *North Am. Com. Co. v. United States* (1897, C. C. A. 9th) 81 Fed. 748 (wrongful act prior to facts creating lien). Before the instant case there seems to have been no decision as to the relative priority of maritime and United Sates tax liens. In *The Melissa Trask, supra*, the United States conceded the priority of the supplyman's lien over the tax lien. A United States tax lien dates "from the time when the assessment list was received by the collector. . . . Provided, however, that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice shall be filed" as specified. 6 U. S. Comp. Sts. 1916, sec. 5908. This section was made a part of the Revenue Act of 1921 by sec. 1300. (2 U. S. Comp. Sts. Ann. Supp. 1923, sec. 6371 4/5 b). Therefore, it was urged in the instant case that since the tax liens attached before the acts were done which created the maritime liens, the tax liens should have priority. Admittedly, this would have given them priority over a common law lien. But the court seems sound in holding that the maritime liens should be

preferred on account of the peculiar considerations which have uniformly allowed maritime liens priority over other securities; *e. g.*, the necessity that the ship complete the voyage for the benefit of all concerned. *Cf.* Beach, *Relative Priority of Maritime Liens* (1924) 33 YALE LAW JOURNAL, 841.

ADMIRALTY—SUITS IN ADMIRALTY ACT—ACTION IN PERSONAM AGAINST THE UNITED STATES.—The libellants brought suits against the United States under the Suits in Admiralty Act, Act of Mar. 9, 1920 (41 Stat. at L. 525) for failure to deliver their cargo which had been lost on a government vessel. It was contended by the defendant that the purpose of the act was to avoid seizures resulting from libels *in rem* against government-owned vessels, and hence a suit *in personam* where no lien against the vessel existed, was not included. *Held*, that the libellants were entitled to a decree against the United States. *The Brush* (Dec. 15, 1925, D. Calif.) [1926] A. M. C. 91.

It has been said that a sovereign cannot be sued, because there can be no legal right against the authority which makes the law on which the right depends. *Kawananakoa v. Polyblank* (1907) 205 U. S. 349, 27 Sup. Ct. 526. A sovereign may, however, be sued with its consent. *Minnesota v. Hitchcock* (1901) 185 U. S. 373, 22 Sup. Ct. 650. Consent was given to suits *in rem* against government vessels by the Shipping Act, Act of Sept. 7, 1916 (39 Stat. at L. 728). *The Lake Monroe* (1919) 250 U. S. 246, 39 Sup. Ct. 460. But, as such remedy *in rem* caused delay to government vessels through seizure under process, this Act was repealed by the Suits in Admiralty Act providing for a libel *in personam* against the United States "where a proceeding in admiralty could be maintained." Clearly an action *in personam* was substituted for an action *in rem* by the latter Act. See 1 Benedict, *Admiralty* (5th ed. 1925) 264, 269. And likewise in a case where either an action *in rem* or *in personam* could formerly have been brought, the *in rem* action has now been abolished. *Markle v. United States* (1925, S. D. Tex.) 8 Fed. (2d) 87. But where an action *in personam* alone existed before this Act, two views have emerged. Some courts have sustained the contention of the defendant in the instant case. *Atlantic Fruit Co. v. United States* (1923, S. D. N. Y.) 8 Fed. (2d) 81. But others have reached the opposite result by looking to the apparent legislative intent as shown by the history of the Act, and the use of the clause "where a proceeding in admiralty could be maintained" instead of the words *in rem* and *in personam* which were separately specified in the original draft. *Agros Corp. v. United States* (1922, S. D. N. Y.) 8 Fed. (2d) 84; see 1 Benedict, *op. cit.* 269. In following this view the instant decision seems to reach a desirable result. A liberal tendency in the construction of this act is evidenced by two recent Supreme Court decisions. *James Shewan & Sons v. United States* (1924) 266 U. S. 103, 45 Sup. Ct. 45 (construction of "merchant vessel"); *Nahmeh v. United States* (1925) 267 U. S. 122, 45 Sup. Ct. 277 (jurisdiction extended to district where libellant resides). Such constructions are to be favored. For a criticism of the extension of government immunity from suits arising from its conduct of business, see (1923) 32 YALE LAW JOURNAL, 839.

BILLS AND NOTES—INTERIM CERTIFICATES NOT NEGOTIABLE.—The defendant banker issued certificates entitling a holder to described bonds and interest "when, as, and if" delivered to the banker. A provision recited that taker and holder gave the maker power to treat any bearer as the absolute owner. When the plaintiff, a bona fide purchaser, presented certificates to be exchanged for bonds, the defendant refused because of

notice of theft from the original owner. On the issue of negotiability, the court found for the defendant. The plaintiff appealed. *Held*, that the judgment be affirmed, for the law merchant and trade usage cannot make instruments negotiable against the express provisions of the N. I. L.—the stipulation that the maker might treat any bearer as absolute owner being an agreement for its protection. *President and Directors of Manhattan Co. v. Morgan* (1926) 242 N. Y. 38, 150 N. E. 594.

Irregular paper has been held negotiable by English courts, if so treated in the market. *Goodwin v. Robarts* (1876, H. L.) L. R. 10 Exch. 337 (scrip certificate for foreign bonds); *Rumball v. Metropolitan Bank* (1877) L. R. 2 Q. B. D. 194 (scrip certificates for private banking stock); *Webb, Hale & Co. v. Alexandria Water Co. Ltd.* (1905, K. B.) 21 T. L. R. 572 (share warrant for stock). And this does not contravene the Bills of Exchange Act. Chalmers, *Bills of Exchange* (8th ed., 1919) 328. But the Negotiable Instruments Law specifically enumerates requirements of negotiable instruments. N. I. L. Sec. 1. *Cf. Hunt v. Eure* (1924) 188 N. C. 716, 125 S. E. 484. And it has been held in cases involving instruments in most respects similar to those described in the N. I. L. that the law merchant is without capacity to make paper negotiable contrary to statute. *King Cattle Co. v. Joseph* (1924) 158 Minn. 481, 199 N. W. 437; (1924) 23 MICH. L. REV. 69; (1918) 6 CALIF. L. REV. 444; see *International Finance Co. v. Northwestern Drug Co.* (1922, D. Minn.) 282 Fed. 920, 922. But even after adopting the N. I. L. irregular instruments have been given elements of negotiability by contract or estoppel. *Union Trust Co. of Rochester v. Oliver et al.* (1915) 214 N. Y. 517, 108 N. E. 809; (voting trust certificate of stock treated in financial circles as negotiable); Aigler, *Recognition of New Types of Negotiable Instruments* (1924) 24 COL. L. REV. 563; *cf. Kelly v. Universal Oil Supply Co.* (1924) 65 Calif. App. 493, 224 Pac. 261 (irregular note and letter waiving defenses). Yet, in other cases where negotiability seems equally desirable it has been denied. *American Nat. Bank of San Francisco v. Sommerville* (1923) 191 Calif. 364, 216 Pac. 376 ("automobile paper"); COMMENTS (1923) 33 YALE LAW JOURNAL, 302; *General Motors Acceptance Corp. v. Garrard* (1925, Idaho) 238 Pac. 524. The court suggested in the instant case that the remedy is by legislation amending the N. I. L. An amendment should not be necessary, although, perhaps, legislation similar to the Uniform Stock Transfer Act would be desirable. Instruments which are quite dissimilar to the types of instruments described in the N. I. L. might, as the court intimated, well be considered as not being within its purview. Bills of lading, prior to legislation codifying the case law development, were held to possess elements of negotiability notwithstanding the N. I. L. *Pisapia v. Hartford & N. Y. Transportation Co.* (1909, Sup. Ct.) 62 Misc. 607, 116 N. Y. Supp. 26; *Manufacturers' Comm. Co. v. Rochester Ry.* (1911, 4th Dept.) 142 App. Div. 249, 126 N. Y. Supp. 1051. Moreover, on the question of legislative intent, neither the Uniform Bills of Lading Act nor the statutes relative to the negotiability of warehouse receipts and stock certificates purport to be amendments to the N. I. L. Hence, although a bill of lading and an *interim* certificate differ in that the one contemplates the delivery of goods, and the other the delivery of securities, it is submitted that the two are sufficiently alike in their failure to meet the requirements of the N. I. L. that the latter (as well as the former) could be given elements of negotiability without contravening the N. I. L.

CONFLICT OF LAWS—CRIMINAL LAW—FALSE PRETENSES—PLACE WHERE CRIME IS COMMITTED.—The defendant, living in California, by false pretenses induced the prosecutor, who lived in Utah, to telegraph money to

the defendant. He received the money in California and was there arrested. He waived extradition and was indicted in Utah for obtaining money by false pretenses. He was convicted by the lower court and appealed. *Held,* (one judge *dissenting*) that the judgment be affirmed since the offense was committed in Utah. *State v. Devot* (1925, Utah) 242 Pac. 395.

Obtaining property by false pretenses is punishable in the state in which the property was "obtained". It has thus been held punishable in the state in which the property was received. *Stewart v. Jessup* (1875) 51 Ind. 413; *Owen v. State* (1923, Okla. Crim. App.) 211 Pac. 1059. But where goods are sent by the defrauded party in state A by common carrier to the defendant in state B, it is generally held, on analogy to the passing of property in the law of sales, that the goods were "obtained" in state A. *In re Stephenson* (1903) 67 Kan. 556, 73 Pac. 62; *State v. Lichliter* (1888) 95 Mo. 402, 8 S. W. 720. The state from which checks or money are sent through the mails is likewise held to be the state where they were "obtained". *Commonwealth v. Wood* (1886) 142 Mass. 459, 8 N. E. 432; *State v. Briggs* (1906) 74 Kan. 377, 86 Pac. 447; but *cf. State v. Smith* (1913) 162 Iowa, 336, 144 N. W. 32; *Bates v. State* (1905) 124 Wis. 612, 103 N. W. 251 (money held obtained in state where money received). But courts apparently will not consider the crime completed if the goods or the money are stopped in transit before reaching the fraudulent party. *Cf. Ex parte Parker* (1881) 11 Neb. 309; see *Bates v. State, supra,* at 617, 103 N. W. at 253. While it is not difficult to consider the railroad or the mail as an instrumentality through which a defendant obtains specific money, it cannot be said that the defendant in the instant case "obtained money" in Utah, within the above definition, when in fact he actually received in California entirely different money from that which was surrendered by the prosecutor to the telegraph company in Utah. However, since the object of a false pretense statute is to punish the defrauder, the new meaning given the words "obtaining money" in the instant case seems proper in this new situation. *Cf.* Dewey, *Corporate Legal Personality* (1926) 35 YALE LAW JOURNAL, 655, 656. Its effect is to emphasize the criminal aspect of fraudulently causing another to relinquish property, rather than that of actually receiving the property. *Cf. Clark v. State* (1916) 14 Ala. App. 633, 72 So. 291 (money is obtained by false pretenses although received by a third party). The decision is unfortunate, only if it means that the crime could not be punished in Utah if the situation of the instant case were reversed as to locality of the acts, and the defendant was to receive in Utah money which was telegraphed from California. Such would not seem to be the necessary result under the common law. See 2 Wharton, *Criminal Law* (11th ed. 1912) sec. 1473. And the difficulty is entirely removed by statutes providing that a crime may be punished if part of it was committed within the state. N. Y. Penal Law, 1909, sec. 1930 (1); Calif. Penal Code, 1923, sec. 27 (1); see NOTES (1926) 26 COL. L. REV. 70.

CONFLICT OF LAWS—LITERARY PROPERTY—INTERNATIONAL COPYRIGHT—INFRINGEMENT OF COMMON LAW PROTECTION OF UNPUBLISHED DRAMATIC WORK.—Plaintiff, a British subject, brought an action to recover damages for infringement in New York of his common law right in a dramatic production written by him in England. Common law rights in unpublished works are expressly reserved to the author by the Copyright Act of March 4, 1909, ch. 320 (35 Stat. at L. 1075). Because common law "copyright" in Great Britain is abolished by the Copyright Act of 1911 (1 & 2 Geo. V, ch. 46, sec. 31) the defendant claimed that the plaintiff had no

standing in court. The jury returned a verdict for the plaintiff, and the defendant moved that the verdict be set aside. *Held*, that the motion be denied. *Roberts v. Petrova* (1925, Sup. Ct. N. Y. Co.) 126 Misc. 86, 213 N. Y. Supp. 434.

The court in the instant case seems to have considered that the right of protection is created by the law of Great Britain, and that the Copyright Act of 1911 does not affect the enforceability of this right in foreign jurisdictions. It is said in an earlier New York case decided prior to the British Act of 1911 which allowed recovery by a British author at a time when both Great Britain and New York gave protection at common law, that if the right was created solely by statute, it might be otherwise, as the statutes could have no extra territorial force. See *Palmer v. DeWitt* (1872) 47 N. Y. 532, 538. Applying the view expressed in the above dictum, a result contrary to the instant decision would be reached. It would seem, however, that protection would really be given a right created by the law of New York. See Cook, *Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457. This result is supported by decisions. *Ferris v. Frohman* (1912) 223 U. S. 424, 32 Sup. Ct. 263 (where performance in Great Britain amounting to publication under a British statute was held not such a publication as to affect the common law protection afforded the British author in the United States); *"Morocco Bound" Syndicate, Ltd. v. Harris* (1895) L. R. 1 Ch. 534 (jurisdiction declined because infringement in Germany was not a violation of a British right). Unpublished works should be protected by each nation regardless of authorship. Bar, *Private International Law* (Gillespie's Tr. 2d ed. 1892) sec. 349 (because of potential connection with the territory of each nation, rather than actual connection with an alien author). An interesting question is presented in the British protection of unpublished works of American authors under the British Copyright Act of 1911. By Order in Council issued under authority of this statute, American unpublished works are protected. Mr. Balfour, Secretary of State, to Mr. Page, Ambassador of the United States, May 17, 1918; Copyright Office Bull. No. 14 (1922) 55. But "the enjoyment of rights conferred by this order shall be subject to the accomplishments of the conditions and formalities prescribed by the law of the United States of America." 1 Statutory Rules and Orders (1915) 54, sec. 1 (ii). What is "the *law* of the United States"? The Copyright Act of 1909, sec. 2, expressly reserves *common law* rights in unpublished works. And section 11 of the Act, concerning works not reproduced for sale, seems, according to the view evidently taken by the Copyright Office, to permit *statutory* protection by registration of unpublished works. Copyright Office Bull. No. 14 (1922) 11, sec. 11, marginal note. But the construction of this section is debated. See Weil, *Copyright Law* (1917) 289 *et seq.* While both sections announce "the *law* of the United States" it may be readily supposed that the British order intended registration under sec. 11, as the prescribed condition and formality. It would seem preferable, however, that, if protected at common law in the United States, the unpublished work should be afforded protection under the British Copyright Act without registration by American authors under sec. 11. Proposed changes in the present American Copyright Law, strongly urged, would clarify the matter by making registration optional. See Solberg, *Copyright Law Reform* (1925) 35 YALE LAW JOURNAL, 48. See also (1926) 35 YALE LAW JOURNAL, 520; (1926) 26 COL. L. REV. 504.

CONTRACTS—ASSIGNMENT—ASSIGNEE'S WAIVER OF A CONDITION—DISCHARGE OF ASSIGNOR.—The plaintiff agreed to build truck frames for

the defendant, delivery to be made monthly within a specified time. Plaintiff repeatedly failed to perform on schedule. In May, 1920, the defendant assigned its business. The plaintiff assented to the assignment without discharging the defendant. In August the assignee requested the plaintiff to delay performance; and in October the former cancelled the unfulfilled part of the contract. The plaintiff sued the assignor to recover for loss sustained. From a judgment for the plaintiff, the defendant appealed. *Held,* that the judgment be reversed and a new trial granted, on the ground that the assignee had no power to waive the condition of performance on time by the plaintiff. *Parish Mfg. Co. v. Martin-Parry Corp.* (1926, Pa.) 131 Atl. 710.

The assignor of an executory bilateral contract can divest himself of all his rights and cause similar ones to arise in favor of the assignee. *Tolhurst v. Associated Mfg. Co.* [1903] A. C. 414. He cannot assign his duties; but he can delegate their performance to the assignee if such performance is not "personal". See *Crane Ice Cream Co. v. Terminal Freezing Co.* (1925, Md.) 128 Atl. 280, 283 (contract to supply on credit ice needed in assignor's business held not enforceable by assignee). An assignment in general terms usually carries with it by implication an agreement by the assignee that he will perform these delegated duties. *Corvallis & A. Ry. v. Portland E. & E. Ry.* (1917) 84 Or. 524, 163 Pac. 1173. The assignor remains bound to the other contracting party for the full performance of his promise. This obligation has many of the elements of suretyship; for instance, it has been held that the contract between the assignor and the assignee makes the latter primarily responsible to pay for goods delivered. *Atlantic & N. C. Ry. v. Atlantic & N. C. Co.* (1908) 147 N. C. 368, 61 S. E. 185; (1921) 21 COL. L. REV. 393. A material change or modification of the original contract, agreed upon by the assignee and the other contracting party without the consent of the assignor, would effect a discharge of the assignor who was bound as surety only to the extent of his original agreement with the third party. *Litchfield v. Garratt* (1862) 10 Mich. 426; *cf. Miller v. Stewart* (1824, U. S.) 9 Wheat. 680. Thus, a binding extension of time given by the plaintiff to the assignee discharges the assignor. *Union Life Ins. Co. v. Hanford* (1892) 143 U. S. 187, 12 Sup. Ct. 437. The instant case, however, does not come within the surety analogy because no extension was granted the assignee. Before the assignment, the assignor's duty was probably conditional upon prompt performance by the plaintiff. *Norrington v. Wright* (1885) 115 U. S. 188, 6 Sup. Ct. 12. This was not changed by reason of the assignment. See *Rochester Lantern Co. v. Stiles & Parker Press* (1892) 135 N. Y. 209, 216, 31 N. E. 1018, 1021. The lateness of the plaintiff's performance amounted to a substantial failure of consideration such as to discharge the assignor from his duty. The assignor in the instant case did not waive this condition, nor did he authorize the assignee to waive it for him. It is submitted that although an assignment of a bilateral contract may create a power in the assignee to discharge the assignor's duty, it does not include a power to make that duty more burdensome by waiving conditions and defenses of the assignor, and hence the instant case seems sound.

CORPORATIONS—LICENSES—STOCK SALES IN VIOLATION OF BLUE SKY LAW NOT VOID.—The plaintiff corporation having sold stock in violation of the Ohio "Blue Sky Law" sued for the unpaid balance of the purchase price. The lower court rendered judgment for the defendant on the ground that the sale was void. The plaintiff appealed. *Held,* that the intention of the legislature was not to make void sales of stock in violation of the

statute, but to punish its violation under penalty. The judgment was affirmed, however, because of improper service on the defendant. *Warren People's Market Co. v. Corbett & Sons* (1926, Ohio) 151 N. E. 51.

To guard against the evils growing out of the marketing of stocks and bonds at fictitious valuations "Blue Sky Laws" have been enacted in many states. Elliott, *Blue Sky Laws* (1919) *passim;* see *Standard Home Co. v. Davis* (1914, E. D. Ark.) 217 Fed. 904, 919. And they have been held constitutional as a proper exercise of the police power to protect citizens against fraud. *Caldwell v. Sioux Falls Stock Yards Co.* (1917) 242 U. S. 559, 37 Sup. Ct. 224 (S. D. Statute); *Merrick v. Halsey & Co.* (1917) 242 U. S. 568, 37 Sup. Ct. 227 (Mich. Statute); *Hall v. Geiger-Jones Co.* (1917) 242 U. S. 539, 37 Sup. Ct. 217 (Ohio statute). Premised upon this interpretation, most courts have held void a sale of stock by a corporation which has not complied with the "Blue Sky Law". *Farm Products Co. of Michigan v. Jordan* (1924) 229 Mich. 235, 201 N. W. 198; *Reno v. American Ice Machine Co.* (1925, Calif.) 237 Pac. 784; *Biddle v. Smith* (1923) 148 Tenn. 489, 256 S. W. 453. For example: A corporation could not recover on a stock subscription. *Witt v. Trustees' Loan & Savings Co.* (1925) 33 Ga. App. 802, 127 S. E. 810. Nor on notes given in payment for such stock. *Farm Products Co. of Michigan v. Jordan, supra; Reilly v. Clyne* (1925, Ariz.) 234 Pac. 35 (purchaser not estopped to deny validity of consideration for note). And courts have allowed a defendant so being sued on his notes to recover on a counterclaim for prior payments. *Guaranty Mortgage Co. v. Wilcox* (1923) 62 Utah 184, 218 Pac. 133. Or to sue independently to recover payments made. *Landwehr v. Lingenfelder* (1923, Mo. App.) 249 S. W. 723; *Edward v. Ioor* (1919) 205 Mich. 617, 172 N. W. 620. In the instant case the court interprets its "Blue Sky Law" according to the supposed intention of its legislature, rather than with an eye to the prevailing view of public policy. This construction has the support of *Watters & Martin v. Homes Corp.* (1923) 136 Va. 114, 116 S. E. 366 (recognizing that the general rule is *contra*). In so holding, however, the court in the instant case seems to have relied principally on the authority of *Vermont Loan & Trust Co. v. Hoffman* (1897) 5 Idaho, 376, 49 Pac. 314, and *Smoot v. Perkins* (1917, Tex. Civ. App.) 195 S. W. 988. The Texas case merely decided that the defendant could not wait until after the corporation became bankrupt before denying his obligation on the stock. For a similar holding, see *In re Racine Auto Tire Co.* (1923, C. C. A. 7th) 290 Fed. 939; but *cf. Goodyear v. Meux* (1920) 143 Tenn. 287, 228 S. W. 57. And the Idaho case recognized the general rule that an act in violation of a statute forbidding it is void, but drew an exception when the statute is penal and "for the protection of the public revenue". It seems, however, that merely fining the corporation for violating the statute would not be so effective a measure as would the prohibiting of recovery of the purchase price. This seems to be the view taken by the latest Idaho decision construing a new statute similar to that in the instant case. *Ashley & Rumelin v. Brady* (1925, Idaho) 238 Pac. 314. It is submitted that the primary justification of these statutes is to protect the public against fraud. It appears that the Ohio Court did not give this purpose its full weight. *Hall v. Geiger-Jones Co., supra;* see David, *What is Wrong With the Blue Sky Law* (1926) 24 OHIO L. BULL. AND REP. 222; 3 *Opinions Ohio Attorney General* (1915) 2074.

CRIMINAL LAW—FALSE PRETENSES—SALE OF MORTGAGED GOODS WITHOUT DISCLOSURE OF MORTGAGE NOT CRIMINAL.—The defendant sold as his own to the prosecuting witness six bales of cotton on which there was an outstanding mortgage. No express misrepresentations were made, however.

The defendant was convicted of obtaining money by false pretenses, and appealed. *Held*, that the judgment be reversed, on the ground that a mere withholding of knowledge will not constitute a false pretense. *McCorkle v. State* (1926, Ark.) 278 S. W. 965.

The false pretense statutes were enacted to extend responsibility for fraudulent conduct not culpable at common law. 2 Bishop, *Criminal Law* (9th ed. 1923) sec. 410. The typical statute punishes the obtaining of money or property by means of an intentionally false representation of a past or existing fact. See 2 Bishop, *op. cit.* secs. 413, 414; *cf.* Ark. Crawford and Moses Sts. 1921, ch. 43, sec. 2449. Most courts hold that such a representation may be made by implication as well as by express language. *Commonwealth v. Beckett* (1905) 119 Ky. 817, 84 S. W. 758; *cf. contra*: *People v. Baker* (1884) 96 N. Y. 340. It may be implied without words from mere conduct. *Regina v. Goss* (1860) 8 Cox. C. C. 262; 2 Wharton, *Criminal Law* (11th ed. 1912) sec. 1434. It should be enough that the idea is distinctly conveyed by words, conduct, or silence, or any combination thereof. 2 Bishop, *op. cit.* sec. 430. Thus the following acts have been held to constitute the offense: Drawing a check on a bank where the drawer has no funds and presenting it to a third person. *State v. Hammelsy* (1908) 52 Or. 156, 96 Pac. 865; *Eaton v. State* (1918) 16 Ala. App. 405, 78 So. 321. Silently uttering a counterfeit note. 2 Bishop, *op. cit.* sec. 430; *cf. Commonwealth v. Beckett, supra.* Selling worthless certificates. *State v. Bourne* (1902) 86 Minn. 432, 90 N. W. 1108. Paying for goods with the note of a third party that has been paid or partially paid. *Regina v. Davis* (1859) 18 U. C. Q. B. 180. Selling a spurious ring as one of true metal, not expressly representing it to be gold, but asking the price of a gold ring. 2 Wharton, *op. cit.* at 1619. Thus the mere suppression of a fact by the vendor may amount to a false pretense. The selling of the goods in the instant case certainly conveyed the idea that they were free from mortgage to the purchaser, for the latter apparently paid full value. *Cf.* Sales Act, sec. 13 (3). It further appears that the defendant intended to convey that idea, knowing it was false, since the jury convicted him. It is submitted that the instant case reaches an unfortunate result in failing to hold such conduct to be within the statute.

CRIMINAL LAW—INSANITY—TEST OF INSANITY AT TIME OF TRIAL.—The defendant was convicted of murder and sentenced to be hanged. Sentence was annulled by the Supreme Court, and the case remanded for the purpose of ascertaining the sanity of the defendant at the time of trial or thereafter. The trial judge appointed a lunacy commission which found that the defendant was thirty years of age, knew right from wrong and was not insane although he was of a mental age of only seven or eight years. The court thereupon re-sentenced him and he appealed. *Held*, (one judge *dissenting*) that the conviction be affirmed on the ground that the evidence did not show that the defendant was insane. *State v. Brodes* (1926, La.) 107 So. 131.

At common law, and in most jurisdictions by statute, the accused cannot be tried or punished when insane, even though he were sane at the time of committing the crime. *State v. Vann* (1881) 84 N. C. 722; *State v. Reed* (1889) 41 La. 581, 7 So. 132; (1918) 27 YALE LAW JOURNAL, 693. When testing the legal responsibility of the insane, the federal courts, as well as about twenty state courts (including Louisiana), follow the criteria of the "right and wrong" test as laid down in *McNaughtan's Case* (1843, P. C.) 10 Cl. & F. 200. *German v. United States* (1908, C. C. A. 6th) 120 Fed. 666; (1916) 30 HARV. L. REV. 179. This test was applied by the majority of the court in the instant case. The problem before the court, how-

ever, was not whether the defendant could distinguish between right and wrong when he committed the alleged murder, but whether he was "insane" at the time of the trial or at any time thereafter. A different test of sanity is there used. *Freeman v. People* (1847, N. Y.) 4 Denio, 9. The general rule seems to be that one incapable of properly appreciating his peril and of rationally assisting in his own defense is so far of unsound mind that he may not be tried, sentenced, or punished. *Freeman v. People, supra; Taffe v. State* (1861) 23 Ark. 34 (by statute); *State v. Reed, supra; United States v. Lancaster* (1877, C. C. N. D. Ill.) 7 Biss. 440; but *cf. Re Schneider* (1893) 21 D. C. 433 (holding that the defendant must be wholly unconscious of his situation). It is held by the civil law, by common law, and by statute that a child between the ages of seven and fourteen is presumed to be incapable of criminal intent, but this may be overcome by evidence. (1680) 1 Hale P. C. 26, 27; *Garner v. State* (1910) 97 Ark. 63, 132 S. W. 1010. It may be that the common law courts made no distinction between a child's capacity for committing the offense and his capability of defending himself. Hence it would be possible to reconcile the decision of the court on this ground. The court, however, based its decision on the defendant's ability to meet the "right and wrong" test. A finding that the defendant at the time of trial could meet the "right and wrong" test should raise no presumption that he was sane (for the purpose of trial) under the test usually applied. The fact that the defendant would not take advice from his attorney during trial tends to show that he was not competent to make a rational defense. *Taffe v. State, supra; Guagando v. State* (1874) 41 Tex. 626; *United States v. Lancaster, supra.* This was the view of the dissenting judge.

FORFEITURE—REPEAL OF ABSOLUTE FORFEITURE PROVISION IN REVENUE LAW BY PROHIBITION ACT.—The plaintiff brought forfeiture proceedings against an automobile under U. S. Comp. Sts. 1916, sec. 6352 of the Internal Revenue Law (U. S. Rev. Sts. 1873, sec. 3450) which provides, *inter alia,* for the forfeiture of vehicles which are used to remove goods on which there is an unpaid tax, with the intent to defraud the government. The assignee of the mortgagee of the car intervened setting up that he had no knowledge of the unlawful use of the car, and as sec. 26 of the Volstead Act exempted the interests of innocent owners and lienors from forfeiture of vehicles seized while illegally transporting liquor, this action was not maintainable under the old statute. The intervener prayed for the return of the car or for the payment of the amount of its interest out of the proceeds of the sale. *Held,* that the prayer be granted, as the former statute is repealed by the Volstead Act in so far as the facts of the instant case are concerned. *United States v. One Chevrolet Coupe* (1925, E. D. Mo.) 9 Fed. (2d) 85.

The courts seem to be in hopeless conflict as to whether the limited forfeiture provision of the Volstead Act impliedly repeals the absolute forfeiture provision of the Internal Revenue Law as to vehicles used for the illegal transportation of liquor. Blakemore, *Prohibition* (2d ed. 1925) 535, *et seq.* Some of the early cases held that as the two statutes referred to different subject matters, and as the elements necessary to conviction under each were different, they were not inconsistent, and hence the former was not repealed. *United States v. One Essex Automobile* (1920, N. D. Ga.) 266 Fed. 138; *United States v. One Cole Automobile* (1921, D. Mont.) 273 Fed. 934. Others held that as the act of removing the liquor was the same whichever statute was involved only the later statute providing the lesser punishment was applicable. *Lewis v. United States* (1922, C. C. A. 6th) 280 Fed. 5; *United States v. One Haynes Auto-*

mobile (1921, C. C. A. 5th) 274 Fed. 926. Some reached the same result on the theory that there was no longer a specific tax on liquor. *One Ford Car v. United States* (1922, C. C. A. 8th) 284 Fed. 823. The Supreme Court held, largely in view of the milder penalties imposed by the Volstead Act, that the penalties in the old tax laws were repealed as to liquor. *United States v. Yuginovich* (1921) 256 U. S. 450, 41 Sup. Ct. 551 (involving old tax laws relating to distillers). In 1921, however, the Willis-Campbell Act was passed, providing that the old laws in regard to the manufacture, tax, and traffic of liquor and their penalties should still be in force except as they were in direct conflict with the Volstead Act (42 Stat. at L. 222). The Supreme Court held that this statute abrogated the rule in the *Yuginovich case, supra. United States v. Stafoff* (1923) 260 U. S. 477, 43 Sup. Ct. 197. But the forfeiture cases are still in the same state of confusion as before the 1921 Act. McFadden, *Prohibition* (1925) 357, *et seq.* Some courts hold that although the old law was repealed by the Volstead Act, it was re-enacted by the 1921 Act. *United States v. One Bay State Roadster* (1924, D. Conn.) 2 Fed. (2d) 616; *United States v. One Ford Auto* (1924, W. D. Tenn.) 2 Fed. (2d) 882. Others maintain that the old law is in direct conflict with the Volstead Act as far as the forfeiture of vehicles seized while transporting liquor is concerned, and hence is not saved by the 1921 Act. *Commercial Credit Co. v. United States* (1925, C. C. A. 6th) 5 Fed. (2d) 1; *United States v. Garth Motor Co.* (1925, C. C. A. 5th) 4 Fed. (2d) 528. Others have simply ignored the 1921 Act, holding that the old law no longer applies. *United States v. One Packard Truck* (1922, E. D. Mich.) 284 Fed. 394. It seems probable that the purpose of the 1921 act was to increase the penalties for the violation of the Volstead Act, among other things, by making the violators also liable for the taxes. It is submitted, however, that as Congress in the Volstead Act expressly manifested an intention to protect the innocent owner and lienor, the object of this provision would have been nullified in the instant case if forfeiture proceedings had been held maintainable under the old statute.

FUTURE INTERESTS—DOWER—RIGHT TO DOWER IN AN ESTATE SUBJECT TO AN EXECUTORY DEVISE.—The testator devised land to his wife, the will providing that upon her death it should be divided up among the testator's children (one of whom was defendant's husband), and if any child should die without issue, his share was to be divided among the other children or their lineal heirs. The testator's wife died and the land was divided according to the will. Later the defendant's husband died without issue, the defendant continuing in possession. In an action for the land by the other children, the court held that the determination of the estate by operation of the executory devise did not deprive the defendant of dower. *Held,* that the judgment be affirmed. *Alexander v. Fleming* (1925, N. C.) 130 S. E. 867.

At common law, a widow entitled to dower had merely a power to call on the heirs for assignment of her share. Before this was done she had no freehold interest in the land. Williams, *Real Property* (22d ed. 1914) 333; 2 Blackstone, *Commentaries,* *135. When an estate is granted on a condition, the estate is not terminated after the condition is broken unless an entry is made; and until such entry there remains an estate from which dower can be assigned. *Ellis v. Kyger* (1886) 90 Mo. 600, 3 S. W. 23; 4 Kent, *Commentaries* (13th ed. 1884) 38. But in the case of a fee subject to a conditional limitation, the estate terminates forthwith on the happening of the condition. It would seem to follow, therefore, that the termination of the estate should destroy dower, for no estate descends to the

heirs out of which dower can be assigned. *Edwards v. Bibb* (1875) 54 Ala. 475; Park, *Dower* (Law Libr. ed. 1836) 84. And such was the view at early common law, *i.e.* termination of the estate also cut off dower. Text-writers since have been inclined the same way in regard to executory devises. 1 Scribner, *Dower* (2d. ed. 1883) 315; Park, *op. cit.* 85. But the common law courts favoring dower, later said that dower was implied in the original grant, and thus created an exception which allowed dower in fee simple estates which had escheated for want of heirs, and in fee tail estates which had reverted for want of issue. *Paines' Case* (1588) 8 Coke, *34a; *Northcut v. Whipp* (1851, Ky.) 12 B. Mon. 65; 2 Coke, *Littleton* *241a; 2 Bright, *Husband & Wife* (1849) 467; 1 Washburn, *Real Property* (6th ed. 1902) sec. 445. However, where the husband's estate terminated otherwise than by death (*i.e.* by recovery, condition, collateral limitation, exercise of power of appointment), the common law courts applied the earlier rule that the widow's dower was cut off by the termination of the estate. *Thompson v. Vance* (1858, Ky.) 1 Met. 670 (power of appointment); Scribner, *op. cit.* 289–297. Later, in dealing with future estates created by springing uses and executory devises which were dependent on statutes, the courts, recognizing the hardship of such a rule, refused to apply it and granted the widow dower despite the logical inconsistency in so holding. *Buckworth v. Thirkell* (1785, K. B.) 3 Bos. & P. 652, note; *Moody v. King* (1825, C. P.) 2 Bing. 447; Kales, *Future Interests* (1920) secs. 451, 452; 3 Preston, *Abstracts of Title* (2d ed. 1824) 373. The instant case, in following this view, is in accord with the majority of the cases on this subject. *Pollard v. Slaughter* (1885) 92 N. C. 72; *Murphy v. Murphy* (1919) 182 Ky. 731, 207 S. W. 491; *Aloe v. Lowe* (1917) 278 Ill. 233, 115 N. E. 862; *Sheffield v. Cooke* (1916) 39 R. I. 217, 98 Atl. 161; *contra*: *Edwards v. Bibb, supra; Hatfield v. Sneden* (1864, N. Y.) 42 Barb. 615.

INTERNATIONAL LAW—TERMINATION OF WAR—EFFECT OF POLITICAL RECOGNITION OF NEW STATE WITHIN ENEMY STATE—STATUS OF RESIDENTS OF NEW STATE AS ALIEN ENEMIES.—The plaintiffs sue under the Indiana Workmen's Compensation Act (Ind. Acts, 1915, ch. 106, sec. 24), as dependents of a deceased employee whose death occurred in September, 1917. The plaintiffs were residents of a village located in what at the time of decedent's death was the Austro-Hungarian Empire but at the time of suit was the newly recognized Kingdom of the Serbs, Croatians and Slovenes (Jugo-Slavia). Defense was the statute of limitations (two years). Claim for compensation was filed in March, 1923, within two years after the official termination of war with the Austro-Hungarian Empire on July 2, 1921, but more than two years after the political recognition of Jugo-Slavia. The lower court held that the action was not barred by the statute of limitations. The defendant appealed. *Held*, that the judgment be affirmed, since the suspension of the operation of the statute of limitations as to alien enemies was not lifted until the termination of the war between the United States and the Austro-Hungarian Empire. *Inland Steel Co. v. Jelenovic* (1926, Ind.) 150 N. E. 391.

At common law a non-resident alien enemy is incapacitated from instituting or maintaining suits; but the statute of limitations is suspended during the discontinuance of this disability. *Hanger v. Abbott* (1868, U. S.) 6 Wall. 532. The Trading with the Enemy Act created certain exceptions to this common law rule, permitting suit by non-resident alien enemies arising from transactions expressly licensed. Act of Oct. 6, 1917 (40 Stat. at L. 411). The instant case does not fall within the exceptions created by this act, for the plaintiffs' cause of action arose before the issue of the general license on July 14, 1919, to trade and communicate

with non-resident alien enemies. Meares, *Trading with the Enemy Act* (1924) 548; *Hungarian General Creditbank v. Titus* (1918, 1st Dept.) 182 App. Div. 826, 169 N. Y. Supp. 926; *cf. Gardanier v. Colada* (1922) 24 Ariz. 185, 207 Pac. 875. Recognition by the political department of the government is conclusive in all courts. *Octjen v. Central Leather Co.* (1918) 246 U. S. 297, 38 Sup. Ct. 309. The recognition by the State Department of Jugo-Slavia expressly left to the Peace Conference the settlement of territorial frontiers. (Feb. 8, 1919) 3 Official Bulletin of U. S. Committee on Public Information No. 533. This recognition did not change the plaintiffs' status as alien enemies, for there was no determination that they were within the territory which Jugo-Slavia might acquire. *Garvin v. Diamond Coal and Coke Co.* (1924) 278 Pa. 469, 123 Atl. 463; *contra*: *cf. Waldes v. Basch* (1919, Sup. Ct. Spec. T.) 109 Misc. 306, 179 N. Y. Supp. 713 (where plaintiff was a resident of the capital of the new state). Austria-Hungary recognized the frontiers and confirmed the domain of Jugo-Slavia by the treaty of St. Germain en Lays, signed September 10, 1919, and effective July 16, 1920. It would seem that this act on the part of the parent state coupled with our previous recognition of the new state should establish the plaintiffs' domicile as within the borders of a friendly nation and thus give them the status of friendly aliens, no longer under a disability to sue in our courts. It would appear, therefore, that the statute of limitations began to run with the removal of this disability and prior to the technical termination of war between the United States and Austria-Hungary, and that it should have been a bar to this action. *Cf. Kolundjija v. Hanna Mining Co.* (1923) 155 Minn. 176, 193 N. W. 163; (1925) 34 YALE LAW JOURNAL, 432; *contra*: *Zeliznik v. Lytle Coal Co.* (1924) 82 Pa. Super. Ct. 489; *cf. Rogulj v. Alaska Gastineau Mining Co.* (1923, C. C. A. 9th) 288 Fed. 549 (where notice within a given period is made a condition precedent to the right to sue under a workmen's compensation statute).

JURY—QUALIFICATION OF WOMEN AS JURORS.—Plaintiff, a woman resident of Illinois and a legal voter in that state, petitioned for a writ of mandamus against the county jury commissioners to compel them to place her name upon the jury list. The jury statute of Illinois (Cahill's Ill. Rev. Sts. 1923, ch. 78, sec. 26) provides that the jury commissioners "shall prepare a list of all electors . . . possessing the necessary legal qualifications for jury duty to be known as the jury list." The lower court gave judgment for the plaintiff, and the defendant appealed. *Held*, that the judgment be reversed, since women, although now entitled to vote, are not electors in the sense in which that word was understood and used by the legislature at the time the statute was enacted. *People ex rel. Fyfe v. Barnett* (1926, Ill.) 150 N. E. 290.

The exclusion of women from jury lists presents a state and not a federal question, for—(1) It is not a denial of due process. *Cf. Maxwell v. Dow* (1900) 176 U. S. 581, 20 Sup. Ct. 448;—(2) it is not a denial of the equal protection of the laws. *Cf. McKinney v. State* (1892) 3 Wyo. 719, 30 Pac. 293;—(3) it is not prohibited by the Nineteenth Amendment, for jury service is no part of suffrage. *State v. James* (1921) 96 N. J. L. 132, 114 Atl. 553. Nor can state legislation granting woman suffrage be construed by implication to qualify women as jurors. *In re Grilli* (1920, Sup. Ct. Spec. T.) 110 Misc. 45, 179 N. Y. Supp. 795; *Harper v. State* (1921) 90 Tex. Cr. R. 252, 234 S. W. 909. At common law women were excluded from jury service. See *Capital Traction Co. v. Hof* (1899) 174 U. S. 1, 13, 19 Sup. Ct. 580, 585; 3 Blackstone, *Commentaries*,* 362. But statutes expressly authorizing women jurors have uniformly been upheld. *Ex parte Mana* (1918) 178 Calif. 213, 172 Pac. 986; *cf. In re Opinion of*

Justices (1921) 237 Mass. 591, 130 N. E. 685. In the instant case, however, the court was called upon to construe jury statutes adopted before woman suffrage. Most of the decisions which have held women disqualified for jury service can be distinguished in that the state constitutions or statutes referred to jurors as "men." *People v. Lensen* (1917) 34 Calif. App. 336, 167 Pac. 406; *State v. Kelley* (1924) 39 Idaho, 668, 229 Pac. 659. In the absence of such provisions most courts have held that women when they became electors *ipso facto* became qualified as jurors. *Parus v. District Court* (1918) 42 Nev. 229, 174 Pac. 706; *State v. Walker* (1921) 192 Iowa, 823, 185 N. W. 619; *Commonwealth v. Maxwell* (1921) 271 Pa. 378, 114 Atl. 825; *People v. Barltz* (1920) 212 Mich. 580, 180 N. W. 423 (notwithstanding a constitutional provision relating to juries of "men"); *contra*: *In re Opinion of Justices, supra* (although the court says that *other* changes in the statutory qualifications of electors have automatically affected the jury list). It is doubtful, however, whether women jurors fall within the purview of such statutes, for the right of women to serve as jurors would ordinarily carry with it the duty to serve; and the Illinois jury statute makes no provision for exemptions peculiarly applicable to women. *Cf. In re Opinion of Justices, supra.* The Illinois Court, it would seem, properly refused to permit such a radical change to rest solely on statutory construction, but preferred to await a clear legislative expression of the state public policy in regard to women jurors. *Cf. Harland v. Territory* (1887) 3 Wash. T. 131, 13 Pac. 453; (1919) 4 A. L. R. 152, note. In some states, by statute, jury duty on the part of women is compulsory; in others it is optional, and in others women are expressly made ineligible. Miller, *The Woman Juror* (1922) 2 OREGON L. REV. 30.

LITERARY PROPERTY—COPYRIGHT—TRADE MARKS—TITLE OF COPYRIGHTED LITERARY WORK PROTECTED.—Plaintiff wrote "The Ballad of Yukon Jake" which was published during 1921–1923. He also prepared a scenario, named "Yukon Jake, the Killer", based on the same plot. Defendant, in 1924, named a film "Yukon Jake", which film portrayed an entirely different story, and distributed it, although advised by the plaintiff of the above facts. The plaintiff brought this action for an injunction, an accounting, and damages. *Held*, that judgment be given for the plaintiff. *Paramore v. Mack Sennett* (1925, S. D. Calif.) 9 Fed. (2d) 66.

The only similarity between the defendant's and the plaintiff's works is in the titles. It is usually said that a title is not the subject of copyright. *Corbett v. Purdy* (1897, C. C. S. D. N. Y.) 80 Fed. 901; *Dicks v. Yates* (1881) L. R. 18 Ch. D. 76. But the title is protected in connection with the substance of the work. *Harper v. Ranous* (1895, C. C. S. D. N. Y.) 67 Fed. 904; *Savage v. Singer* (1914, C. P.) 24 Pa. Dist. 482. If the work then fails of protection, the title also fails. *Jollie v. Jaques* (1850, C. C. S. D. N. Y.) 1 Blatch. 618; see *Black v. Ehrich* (1891, C. C. S. D. N. Y.) 44 Fed. 793, 794. When the copyright upon the work has expired, the title may be used by anyone. *Glaser v. St. Elmo Co.* (1909, C. C. S. D. N. Y.) 175 Fed. 276; *Merriam v. Famous Shoe Co.* (1891, C. C. E. D. Mo.) 47 Fed. 411. Titles may be protected in other ways: As registered trade marks. *Cf.* Hopkins, *Trade Marks, Trade Names, and Unfair Competition* (4th ed. 1924) sec. 85 *et. seq.* Or, as common law trade marks. *Social Register Asso. v. Howard* (1894, C. C. N. J.) 60 Fed. 270. The infringing work must, however, ordinarily be of the same nature as the original. *Cf. Atlas Mfg. Co. v. Street* (1913, C. C. A. 8th.) 204 Fed. 398; *Estes v. Williams* (1884, C. C. S. D. N. Y.) 21 Fed. 189; *Munro v. Tousey* (1891) 129 N. Y. 38, 29 N. E. 9. But there seems to be a tendency to give broader

protection, on the ground of unfair competition, where there is reasonable probability of injury to the plaintiff or to the public. *Wall v. Rolls-Royce* (1925, C. C. A. 3d) 4 Fed. (2d) 333 (maker of radio tubes enjoined from use of name of automobile manufacturers); *Vogue Co. v. Thompson* (1924, C. C. A. 6th) 300 Fed. 509 (maker of hats enjoined from use of mark similar to plaintiff's mark for fashion magazine); *Fisher v. Star Co.* (1921) 231 N. Y. 414, 132 N. E. 133 (restraint of publication of cartoons designated as "Mutt and Jeff"); *Hopkins Amusement Co. v. Frohman* (1903) 202 Ill. 541, 67 N. E. 391 (play "Sherlock Holmes, Detective" enjoined by producer of "Sherlock Holmes" on ground of public deception). When the sole similarity between stage plays and moving pictures has been in the title, injunctions have been granted. *Dickey v. Mutual Film Corp.* (1916, Spec. T.) 160 N. Y. Supp. 609; *Klaw v. General Film Co.* (1915, Spec. T.) 154 N. Y. Supp. 988, *aff'd* (1915, 1st Dept.) 171 App. Div. 945, 156 N. Y. Supp. 1128. The protection accorded the plaintiff in the instant case seems to rest solely on the principles of unfair competition.

NAVIGABLE WATERS—LANDS UNDER NAVIGABLE WATERS BELONG TO STATE.—Prior to the admission of the territory of Minnesota as a state, the United States had granted certain lands therein to the Indians. This area included a navigable lake. After the admission of Minnesota as a State, the Indians ceded these lands to the United States, to be sold for their benefit. Later, Minnesota drained the lake, and relinquished her rights to the riparian owners. The United States brought a bill in equity to quiet title to the bed of the lake, claiming under the grant from the Indians. The bill was dismissed. *Held*, that the order be affirmed, since the title to the lands under the lake, not having been granted to the Indians, passed to Minnesota upon its becoming a State. *United States v. Holt State Bank* (1925, Oct. Term.) 46 Sup. Ct. 197.

This decision accords with the general doctrine that title to the beds of navigable waters held by the United States vests in the state upon its admission to the Union. *Pollard v. Hagan* (1845, U. S.) 3 How. 212; see *Shively v. Bowlby* (1894) 152 U. S. 1, 26, 14 Sup. Ct. 548, 558. Of course this does not exclude the power of the United States to take such lands without compensation for the improvement of navigation. *Lewis Blue Point Oyster Co. v. Briggs* (1913) 229 U. S. 82, 33 Sup. Ct. 679. Title to such lands is given to the state in order to put newly admitted states on an equal basis with the original thirteen. See *Pollard v. Hagan, supra*, at 229; *Oklahoma v. Texas* (1922) 258 U. S. 574, 583, 42 Sup. Ct. 406, 410. The latter are said to hold such title as successors to the rights of the Crown. See Stevenson, *Title of Land Under Water in New York* (1914) 23 YALE LAW JOURNAL, 397; 1 *Farnum, Waters and Water Rights* (1904) 178. Hence, after admission of a state, a conveyance by the United States of lands within the state bordering on navigable waters does not of itself convey any title beyond highwater mark. *Shively v. Bowlby, supra;* see *Hardin v. Shedd* (1903) 190 U. S. 508, 509, 23 Sup. Ct. 635. Whatever title to submerged land the grantee acquires in such case is derived from the state rather than from the federal government. *Packer v. Bird* (1891) 137 U. S. 661, 11 Sup. Ct. 210; see Hallam, *Rights in Soil and Minerals Under Water* (1917) 1 MINN. L. REV. 34, 37. In some states, private ownership extends only to high water mark. *Mears Slayton Bldg. Material Co. v. Boynton* (1924) 233 Ill. App. 256 (Lake Michigan); see *Van Siclen v. Muir* (1907) 46 Wash. 38, 42, 89 Pac. 188, 189. Whereas in others it extends to the low water mark. *Town of Orange v. Resnik* (1920) 94 Conn. 573, 109 Atl. 864 (Long Island Sound); *cf. State v. City of Tampa* (1924, Fla.) 102 So. 336 (statute divesting state of all property rights in

all submerged lands upheld). Or to the mid-channel of a navigable stream. *Goff v. Cougle* (1898) 118 Mich. 307, 76 N. W. 489; *cf. Cross v. Berlin Mills Co.* (1918) 79 N. H. 116, 105 Atl. 411.

PARENT AND CHILD—REVOCATION OF ADOPTION—POWER OF STATE TO CUT OFF EXPECTANCY OF INHERITANCE.—The contestants of the testator's will claim as his heirs through their mother, now deceased, whom the testator adopted by a special act of the legislature in 1863. This adoption was expressly revoked by another special act in 1874. The probate court found that the contestants were not heirs of the testator. From an order denying a new trial of that issue, the contestants appealed. *Held*, that the order be affirmed. *In re Hack's Estate* (1926, Minn.) 207 N. W. 17.

Adoption is a creature of statute, unknown to the common law. *Woodward's Appeal* (1908) 81 Conn. 152, 70 Atl. 453; Peck, *Domestic Relations* (1913) 246. Prior to statutes enabling adoption, it was possible only by special act of the legislature, as in the instant case. The result of adoption, however effected, is the creation of a status, that of parent and child, and not a contractual obligation. In this respect it is similar to marriage. *Matter of Ziegler* (1913, Surro.) 82 Misc. 346, 143 N. Y. Supp. 562 (holding adoption a status); *Maynard v. Hill* (1888) 125 U. S. 190, 8 Sup. Ct. 723 (holding marriage a status); Peck, *op. cit.* 251. Many states have statutes expressly permitting revocation or abrogation of adoption for cause shown or by consent of all the parties, *i. e.*, natural parents, foster parents and the child, if the latter is over a certain age. *E.g.*, Minn. Gen. Sts. 1923, ch. 73, sec. 8631; N. Y. Cons. Laws, 1923, ch. 14, sec. 116–118. Such statutes have been upheld. *Buttrey v. West* (1924) 212 Ala. 321, 102 So. 456; *Matter of Ziegler, supra.* And since divorce may be validly granted by special act of the legislature the same power may fairly be supposed to exist over adoption, as in the instant case. *Maynard v. Hill, supra; Starr v. Pease* (1831) 8 Conn. 541 (divorce granted by legislature). The right to dower may be extinguished by divorce. Peck, *op. cit.* sec. 60. By analogy, revocation of adoption should cut off the child's expectancy of inheritance. The instant case seems sound in so holding. Courts have consistently refused to recognize any "vested" interest in an heir's expectancy of inheritance, and have upheld the power of the state to alter the inheritance laws. *In re Hagar's Estate* (1924, Vt.) 126 Atl. 507; *Simpson v. Simpson* (1886) 114 Ill. 603, 4 N. E. 137; *Buck v. Kittle's Estate* (1877) 49 Vt. 288; *Marshall v. King* (1852) 24 Miss. 85; *cf. Nugent v. Smith* (1922, 1st Dept.) 202 App. Div. 279, 195 N. Y. Supp. 338. And courts have so little recognized this expectancy that no cause of action will lie for fraud by third persons causing the testator to make or change a will. *Hall v. Hall* (1917) 91 Conn. 514, 100 Atl. 441; *Hutchins v. Hutchins* (1845, N. Y.) 7 Hill, 104; but see *Lewis v. Corbin* (1907) 195 Mass. 520, 526, 81 N. E. 248, 250; COMMENTS (1917) 27 YALE LAW JOURNAL, 263. Of expectancies generally see NOTES (1925) 25 COL. L. REV. 215.

PERSONAL PROPERTY—GIFTS—FORGIVENESS OF DEBTS—DELIVERY OF RECEIPT.—The plaintiff tendered to the defendant's intestate a check in payment of an instalment due under a contract of purchase of real estate. The latter accepted the check as payment for the instalment due, but declared that the plaintiff need not pay the remaining instalments and handed the check to the plaintiff instructing him to indorse on it "Paid in full on home on M. Street". Plaintiff made the indorsement and gave back the check which was cashed. On refusal of defendant to give a deed to the property the plaintiff petitioned for an order requiring its execution. The

lower court decided that the deceased had made a valid gift to the plaintiff of the unpaid instalments and gave judgment for the plaintiff. *Held*, that the judgment be affirmed. *In re Dohm's Estate* (1926, Wis.) 206 N. W. 877.

Ordinarily a liquidated claim cannot be discharged by mere part payment. *Foakes v. Beer* (1884) 9 App. Cas. 605. This is so although the creditor delivers a receipt in full. *Galowitz v. Hendlin* (1914, Sup. Ct.) 150 N. Y. Supp. 641; 1 Williston, *Contracts* (1920) Sec. 120. However, where the discharge is intended as a gratuity and not to induce part payment, delivery of a receipt discharges the debt. *Gray v. Barton* (1873) 55 N. Y. 68; *cf. Stewart v. Hidden* (1868) 13 Minn. 43 (gratuitous delivery of note to maker by holder); (1925) 37 A. L. R. 1137, note. Such discharge is described as a "gift" of the indebtedness. In the case of a gift of a chattel, delivery is essential under the traditional view. *Cochrane v. Moore* (1890) 25 Q. B. D. 57. The suggestion has been made that, while delivery is of importance as confirming the donative intent, it should no longer be treated as a *sine qua non* of a valid gift, and that any act tending to prove the gift intent should suffice. NOTES (1924) 24 COL. L. REV. 767. There is some support for this view. *Matter of Cohn* (1919, 1st Dept.) 187 App. Div. 392, 176 N. Y. Supp. 225 (delivery of letter announcing intention to make gift of bonds); *Hillebrand v. Brewer* (1851) 6 Tex. 45 (marking cattle with a brand registered in the name of donee). A gift of a debt may be made without any delivery by destroying the note evidencing the debt. *Sullivan v. Shea* (1916) 32 Calif. App. 369, 162 Pac. 925. This is recognized by statute as a discharge of the note. N. I. L., sec. 119. Also indorsement of payment on the instrument of debt by the creditor in the presence of the debtor may constitute a gift of the debt, if so intended. *Green v. Langdon* (1873) 28 Mich. 221 (indorsement on mortgage); *In re Lewis's Estate* (1891) 139 Pa. 640, 22 Atl. 635 (indorsement on mortgage bonds); see *Morey v. Wiley* (1902) 100 Ill. App. 75, 78; but *cf. Helmer v. Helmer* (1924, Ga.) 125 S. E. 849 (debt not discharged when indorsement made without knowledge of the debtor). The indorsement can be made by the debtor when authorized by the creditor. *Albert v. Albert* (1891) 74 Md. 526, 22 Atl. 408 (debtor credited himself on his own books at direction of creditor); *Green v. Langdon, supra* (indorsement made by debtor's wife at direction of creditor). But in the instant case the indorsement was not made on an instrument evidencing the debt forgiven; and in this respect the decision goes further than the authorities. However, the donor's indorsement necessary to the cashing of the check might well be regarded as an acknowledgment of the receipt written on the back (by the donee), and the presentment for payment as a delivery of such receipt to the bank as agent for the donee. On this interpretation, the instant case might be brought within the rule of *Gray v. Barton, supra*.

SPECIFIC PERFORMANCE—MUTUALITY—EXECUTORY CONTRACT HELD NOT ENFORCEABLE BY AN INFANT WHO RATIFIED AFTER BECOMING OF AGE.—When the plaintiff was nineteen years old, he contracted to purchase land from the defendant. A provision of the contract made time of the essence. The plaintiff tendered payments on the agreed dates, but the defendant refused to convey. The plaintiff's next friend brought this suit for specific performance, and after the beginning of the suit, the plaintiff, becoming of age, affirmed the contract and continued the action in his own name. The lower court denied the relief asked. *Held*, on appeal, that the judgment be affirmed on the ground that the remedy was not mutual when the contract was made, and, since time was of the essence, specific performance could not be granted after the infant had attained his majority. *Bracy v. Miller* (1926, Ark.) 278 S. W. 41.

Specific performance of a purely executory contract is usually denied an infant because the remedy is not mutual. *Flight v. Bolland* (1828) 4 Russ. Ch. 298; *Freeman v. Fishman* (1923) 245 Mass. 222, 139 N. E. 846; Pomeroy, *Specific Performance of Contracts* (3d ed. 1926) sec. 164. The rule is justified as being necessary to protect the other party from loss through possible repudiation by the infant. NOTES (1926) 26 COL. L. REV. 336, 338. Specific performance is, of course, decreed where the contract was made for the infant by his guardian. *Guy v. Hansow* (1912) 86 Kan. 933, 122 Pac. 879. For then the remedy is mutual when the contract is made. *Smith v. Smith* (1867) 36 Ga. 184. But an infant himself may enforce the contract where he has fully performed personal services as consideration. *Asberry v. Mitchell* (1917) 121 Va. 276, 93 S. E. 638. Similarly the remedy has been granted where the infant was in possession and made valuable improvements. *Seaton v. Tohill* (1898) 11 Colo. App. 211, 53 Pac. 170. In these cases the courts based their decisions on the ground that the enforcement of the contract would be beneficial to the infant. See *Asberry v. Mitchell, supra,* at 282, 93 S. E. at 640; see also *Seaton v. Tohill, supra,* at 215, 53 Pac. at 171. It seems, however, that once the remedy is granted, the infant cannot thereafter disaffirm. See *Asberry v. Mitchell, supra,* at 283, 93 S. E. at 640. That being so, the infant's minority would seem to be no reason for refusing the remedy generally in cases of executory contracts, deemed by the court to be beneficial to the infant. Yet, according to Fry's rule, the mutuality must have existed at the inception of the contract. Fry, *Specific Performance of Contracts* (6th ed. 1921) sec. 460. Nevertheless, it has been said that an infant may secure specific performance by affirming the contract when he becomes of age. See *Solt v. Anderson* (1902) 63 Nebr. 734, 737, 89 N. W. 306, 308; Ames, *Lectures on Legal History* (1913) 374; Stone, *Mutuality Rule in New York* (1916) 16 COL. L. REV. 443, 446. This was early recognized where the infant was in possession of the land. *Clayton v. Ashdown* (1715) 9 Vin. Abr. 393. And on the whole, this policy seems in keeping with the better view of mutuality, that "the decree if rendered, will operate without injustice or oppression either to the plaintiff or to the defendant". See Justice Cardozo, in *Epstein v. Gluckin* (1922) 233 N. Y. 490, 494, 135 N. E. 861, 862. But the court in the present case found that in view of the fact that time was of the essence, it would be inequitable to enforce the contract at this late date. The infant is therefore confronted with a dilemma, which might well be solved by a more liberal view of mutuality in infants' contracts.

TORTS—BROKER—FRAUDULENT INTERFERENCE WITH PROSPECTIVE CONTRACT.—The plaintiff, a real estate broker, procured one O'Brien as purchaser at terms satisfactory to the vendor. O'Brien, however, refused to sign a written contract because a second broker, having learned of the plaintiff's negotiations, induced O'Brien to permit him to make a lower offer to the owner in the name of a third person. The owner accepted the latter offer in reliance upon the defendant's fraudulent statement that he was not representing O'Brien. The third party assigned his contract to O'Brien the next day. The plaintiff sued the owner, second broker, and purchaser. Judgment was given against all but the owner, and the other defendants appealed. *Held,* that the judgment be affirmed on the ground that the defendants had fraudulently interfered with the plaintiff's business. *Skene v. Carayanis* (1926) 103 Conn. 708, 131 Atl. 497.

A party to a contract has a cause of action against one who knowingly induces the other party to break the contract. *Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216; *Angle v. Chicago etc. Ry.* (1895) 151 U. S. 1, 14

Sup. Ct. 240. It is immaterial that such contract is unenforceable because not in writing as required by the Statute of Frauds. *Benton v. Pratt* (1827, N. Y.) 2 Wend. 385; *Cumberland Glass Mfg. Co. v. DeWitt* (1913) 120 Md. 381, 87 Atl. 927; *Rice v. Manley* (1876) 66 N. Y. 82. Even where there is no contract, intentional interference with another's business is actionable unless privileged. Competition ordinarily constitutes a sufficient justification for resulting harm, but if the interference is brought about by fraud, or intimidation this defense is not available. See *Mogul S. S. Co. v. McGregor* (1889) L. R. 23 Ch. Div. 598, 614. This rule has been generally followed. *Dunshee v. Standard Oil Co.* (1911) 152 Iowa, 618, 132 N. W. 371; *Hutton v. Watters* (1915) 132 Tenn. 527, 179 S. W. 134. The opposite result is reached where the element of fraud is absent. See *Ashley et al. v. Dixon* (1872) 48 N. Y. 430, 432. Actual damage must, however, be shown in a tort action for fraud. See *Bowen v. Hall* (1881) 6 Q. B. D. 333, 337. And an agent who is the procuring cause of a sale made by the owner, or a second broker, may recover his commission from the vendor. *Reynolds v. Tompkins* (1883) 23 W. Va. 229; *Hoadley v. Savings Bank of Danbury* (1899) 71 Conn. 599, 42 Atl. 667. So it might be urged that the plaintiff suffered no damage. The plaintiff has lost the advertisement incidental to the sale, however. Also, were she to sue for commission, she would undoubtedly incur the ill will of the owner and thus lose the expectancy of his business. Hence the instant case seems sound since the defendant's fraudulent conduct has caused loss other than that of commission.